105 FERC ¶ 61,333
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

City of Tacoma, Washington Project No. 460-028

ORDER DENYING REHEARING OF CZMA CERTIFICATION DECISION, REJECTING REHEARING OF CWA CERTIFICATION DECISION, AND REJECTING PETITION FOR DECLARATORY ORDER AND MOTION FOR SUMMARY DISPOSITION OF CWA CERTIFICATION ISSUES

(Issued December 22, 2003)

1. The Skokomish Indian Tribe seeks rehearing of that portion of our order of September 24, 2003, that denied its petition for a declaratory order and motion for summary disposition regarding the validity of the licensee's certifications for the Cushman Hydroelectric Project under the Coastal Zone Management Act (CZMA) and the Clean Water Act (CWA).[1] For the reasons discussed below, we deny the Tribe's request for rehearing of our decision on the CZMA certification issues, reject the Tribe's request for rehearing of our decision on the CWA certification issues, and reject as an untimely rehearing request the Tribe's petition for a declaratory order and motion for summary disposition of the CWA certification issues.

BACKGROUND

2. As explained in more detail in our September 24 Order, we issued a new license for the Cushman Project in 1998, and subsequently stayed the new license pending judicial review and further order of the Commission. On October 30, 2000, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for completion of formal consultation under Section 7(a)(2) of the Endangered Species Act (ESA). The Commission recently received draft biological opinions from the National Marine Fisheries Service (NOAA Fisheries) and the U.S. Fish and Wildlife Service (FWS).[2]

---

[1] City of Tacoma, Washington, 104 FERC ¶ 61,324 (2003).

[2] See NOAA Fisheries' Draft Biological Opinion for the Cushman Hydroelectric Project (filed December 1, 2003); FWS's Draft Biological Opinion for the Cushman Hydroelectric Project (filed December 9, 2003).

3. On March 3, 2003, the Tribe filed a motion to partially lift the stay to establish interim conditions to benefit ESA-listed species pending judicial review. In our September 24 Order, we held the Tribe's motion in abeyance and directed the appointment of a settlement judge for a proceeding on interim conditions. That proceeding is underway, and is expected to result in a final impact assessment and proposed interim protective plan by December 23, 2003.[3] The Tribe does not seek rehearing of that portion of our order.

4. On April 25, 2003, the Tribe filed a petition for a declaratory order and motion for summary disposition, requesting that the Commission declare that the licensee's certifications under the CZMA and the CWA, which were required for relicensing, did not comply with the applicable statutes. In our September 24 Order, we denied the Tribe's petition and motion. On October 24, 2003, the Tribe filed its request for rehearing.

DISCUSSION

5. Before addressing the Tribe's arguments on rehearing, some consideration of their context is necessary. The relicensing proceeding for the Cushman Project has been complex, controversial, and contentious. When the Commission issued the new license in 1998, the proceeding had been pending for more than two decades. Many parties filed petitions for judicial review, including Tacoma, the Tribe, and the Departments of the Interior and Commerce. Several species of fish were listed as threatened after the Commission issued its relicensing decision. On October 30, 2000, anticipating that a biological opinion was imminent, the court remanded the case to the Commission for completion of formal ESA consultation.

6. The Tribe filed its petition regarding the CZMA consistency certification process and water quality certification for the project on April 24, 2003, nearly two and one-half years after the court remanded the case to us. Thus, these arguments are raised very late in the process. In fact, it now appears that the Commission may soon be in a position to review the final biological opinions, make any necessary revisions to the new license, and issue a final relicensing decision. At this juncture, we are particularly mindful of the possibility that our action might further delay this already protracted proceeding.

[3] See Post-Conference Order Confirming Fact-Finding Procedures and Schedule (October 17, 2003), and Order Modifying Procedural Schedule (November 19, 2003), both issued in the docket for this proceeding.

A. Coastal Zone Consistency Certification

7. The Tribe's petition regarding Tacoma's CZMA certification is based on court proceedings that the Tribe instituted while the relicensing proceeding was still pending before us, but were not completed until 2000, while the case was pending before the D.C. Circuit Court of Appeals. A brief review of the applicable law and procedural history of this issue should be helpful.

8. As noted in our 1998 relicensing order, under Section 307(c)(3)(A) of the CZMA, 16 U.S.C. §1456(c)(3)(A), the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the license applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within 180 days of its receipt of the applicant's certification. On June 20, 1996, Tacoma certified to the Washington Department of Ecology (Ecology), the state's CZMA agency, that the Cushman Project complies with Washington's CZMA program and will be conducted in a manner consistent with that program. By letter filed May 12, 1997, Ecology concluded that the project "as proposed by Tacoma does not comply" with Washington's CZMA program, and "will not be conducted in a manner consistent with the program requirements."[4] However, Ecology further stated that it "declines its right to take action under its Coastal Zone Management authority with respect to Tacoma's license application" pending before the Commission. Ecology also stated that the Commission staff's recommended flow regime of 240 cubic feet per second (cfs) or inflow, whichever is less, during the summer recreation period, plus flushing flows of 400 cfs for the month of November, "is the absolute minimum flow necessary to adequately protect designated uses within the North Fork of the Skokomish River."[5]

9. The Tribe requested that the Department of Commerce, which administers the CZMA program, review Ecology's action. By letter dated July 9, 1997, Commerce denied the Tribe's request, finding that "[i]n this case, Ecology's concurrence with the

[4] Letter from Tom Fitzsimmons, Ecology, to Garth Jackson, Tacoma, and Lois Cashell, Commission Secretary (filed May 12, 1997).

[5] Id. By federal regulation, the six-month period for objection does not commence until the state has received all necessary data and information required by the state's program to begin its review. 15 C.F.R. § 930.60. Although there was some dispute among the parties regarding when Tacoma's certification was complete, we found that dispute moot in view of the state's decision not to exercise its CZMA authority. 84 FERC ¶ 61,107 at n. 46 (1998).

Cushman project is conclusively presumed."[6] The Tribe then sought review of Ecology's decision in state court. The trial court dismissed the Tribe's petition as moot, and the Tribe appealed. While that appeal was pending, the Commission issued a new license for the Cushman Project on July 30, 1998. The Commission issued its order on rehearing on March 31, 1999, and the parties filed their petitions for judicial review shortly thereafter.

10. On August 20, 1999, while review of the new license was pending before the D.C. Circuit Court of Appeals, the Washington Court of Appeals issued a decision on the Tribe's CZMA appeal.[7] The Washington court reversed and remanded, with instructions to Ecology "to issue a new letter in response to Tacoma's 'consistency certification.'"[8] The court found Ecology's action arbitrary and capricious, because Ecology had found Tacoma's project inconsistent with the state's coastal zone program but had failed to object. On January 5, 2000, the Supreme Court of Washington denied Ecology's petition for review.[9]

11. On February 9, 2000, Ecology issued a letter "in response to Tacoma's Coastal Zone Consistency Certification" for the proposed Cushman Project. Ecology explained that it was issuing the letter "[t]o comply with the Court's order." Ecology stated: [10]

> As I noted in my original letter to Tacoma Power on May 6, 1997, Ecology finds that the Cushman Project, as proposed, would not be consistent with the state's federally-approved Coastal Zone Management Program (CZMP). We find that Tacoma's proposed instream flow regime of 100 cfs (with minor pulsing flows in the fall and winter) would be inadequate for salmon and steelhead habitat in the North Fork Skokomish River. Consequently, the project would not meet state water quality standards, a key enforceable policy of the CZMP.

---

[6] Letter to Mason Morisset, Skokomis Tribe, from Jeffrey Benoit, Commerce (filed July 14, 1997).

[7] Skokomish Indian Tribe v. Fitzsimmons, 97 Wash. App. 84, 982 P.2d 1179 (1999).

[8] 982 P.2d 1179 at 1186.

[9] 143 Wash. 2d 1018 (2000).

[10] Letter to Steve Klein, Tacoma, from Tom Fitzsimmons, Ecology (filed February 17, 2000).

> It is Ecology's position that Tacoma Power should release a minimum flow of 240 cfs (or inflow at Cushman Dam No. 2, whichever is less) to the North Fork Skokomish River. During flood events spill may have to be reduced. It also is Ecology's position that Tacoma Power should be required to participate in an adaptive management process with the goal of increasing flows in the river to more natural levels. This process should include an evaluation whether higher instream flows have a positive effect on reversing channel aggradation in the mainstem Skokomish River. An instream flow adaptive management program would afford the opportunity to balance the designated uses of the North Fork and mainstem Skokomish River with public health and safety concerns (e.g., flood prevention).

12. As noted, the state court review of the CZMA certification was completed in early 2000, and the D.C. Circuit remanded the relicensing case to the Commission for completion of ESA consultation on October 30, 2000. The Tribe filed its petition much later, on April 25, 2003, asking that we issue an order "acknowledging the invalidity of the 1997 Cushman project [CZMA] certification process," and "declaring that [the Commission] will refrain from issuing a license for the project until after Tacoma has submitted a CZMA certification to [Ecology] and after a legal certification process has been completed."[11] In its petition, the Tribe made no mention of Ecology's letter of February 9, 2000, in response to the state court's remand.

13. We denied the Tribe's petition in our order of September 24, 2003, finding that Ecology's letter of February 9, 2000, was consistent with the terms of the new license that we had issued for the Cushman Project and was therefore sufficient to support our relicensing decision in this case.[12]

14. On rehearing, the Tribe reiterates its complaints about the 1997 certification process, and argues that Ecology's letter of February 7, 2000, "by no means satisfies the requirements of a CZMA consistency review."[13] Rather, the Tribe argues that Ecology must "issue public notice and proceed to hold Tacoma's proposed license against the entire Washington coastal program."[14] The Tribe also argues that "Ecology's formal

---

[11] Tribe's request for rehearing at 2.

[12] 104 FERC ¶61,324 at P.19.

[13] Tribe's request for rehearing at 4 (emphasis in original).

[14] Id.

CZMA consistency findings would attach mandatory conditions to the license, not flimsy 'suggestions' that the Commission can freely discard."[15]

15. We are unable to grant the requested relief in this case. Ecology has issued its decision in response to the state court's remand, and we have no authority to review the validity of Ecology's action. In response to the remand, Ecology has issued, for a second time, a letter that is substantially similar to the one it issued in 1997. Ecology finds that Tacoma's proposed project, with a minimum flow of 100 cfs, is inconsistent with the state's CZMP. However, Ecology also states that Tacoma should release a minimum flow of 240 cfs or inflow, whichever is less.

16. The new license that we issued in 1998 is consistent with Ecology's letter of February 9, 2002, as it requires that Tacoma release a minimum flow of 240 cfs or inflow, whichever is less. The new license is also consistent with the other recommendations in Ecology's letter. In these circumstances, where Ecology has been ordered to issue a new letter in response to Tacoma's consistency certification and has done so, we believe that no useful purpose would be served by requiring Tacoma to file yet another consistency certification. At this late date, with draft biological opinions in hand, the prospect of a final relicensing decision appears to be reasonably foreseeable. Therefore, we do not believe that it would serve the public interest to further delay our decision while Tacoma undertakes to obtain a third CZMA consistency determination from Ecology.[16]

---

[15] Id. at 5 (emphasis in original).

[16] The Tribe argues that we mischaracterized its petition as asking us to "declare invalid" or "invalidate" Tacoma's consistency certification and "require that Tacoma obtain a new certification or waiver from the state." Tribe's request for rehearing at 2. In the Tribe's view, this difference is "not merely semantics," because the Tribe carefully crafted its request to remain within the Commission's jurisdiction. Id. As a practical matter, we fail to see any real difference between a decision to "acknowledge the invalidity" of the 1997 process and one declaring that we will not issue a new license until Tacoma obtains a new certification or waiver based on that acknowledgement of invalidity. The Tribe's petition asked us to declare the certification process, if not the certification itself, in violation of federal law. Declaring the certification process invalid would require us to invalidate the new license, as well as to inform Tacoma we would not issue a new license without first receiving evidence of a new certification or waiver. In the circumstances of this case, we are unwilling to do this, regardless of how the requested relief might be characterized.

B. Water Quality Certification

17. As noted, the Tribe's petition of April 25, 2003, also raised issues concerning Tacoma's water quality certification for the Cushman Project.[17] However, unlike the CZMA portion of the petition, the CWA portion of the Tribe's petition was not based on any subsequent developments or new information regarding Ecology's 1987 water quality certification for the Cushman Project. Rather, the petition relied on essentially the same information and arguments that the Tribe had raised on rehearing of the relicense order in 1998.[18] As such, the petition constitutes an untimely request for rehearing, and should have been rejected on that basis. Under Section 313 of the Federal Power Act, parties aggrieved by a Commission order must request rehearing within 30 days after the issuance of the order. This statutory time limit is jurisdictional, and the Commission has no authority to waive it.[19] Accordingly, we reject the Tribe's petition on CWA issues as an untimely rehearing request and need not consider it further. Similarly, we reject the Tribe's request for rehearing of our order of September 24, 2003,

[17] Under Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1341(a)(1), the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that conditions of the certification shall become a condition of any federal license that authorizes construction or operation of the project. 33 U.S.C. § 1341(d).

As noted in our 1998 order issuing a new license, Tacoma requested water quality certification for the Cushman Project on June 27, 1984. Ecology issued certification on April 30, 1985. Tacoma appealed the certification, and Tacoma and Ecology subsequently reached a settlement. Pursuant to that settlement, Ecology issued a revised certification on December 30, 1987. The Tribe raised objections to Ecology's revised certification, both in the relicensing proceeding and on rehearing. On March 31, 1999, the Commission denied rehearing, finding that it had no authority to review the validity of the state's certification decision.

[18] See Tribe's petition for declaratory order at pp. 13-24 (filed April 25, 2003); Tribe's request for rehearing of Commission order of July 30, 1998, at pp. 30-39 (filed August 30, 1998). The Tribe raised the notice issue in 1998. Although the Tribe's arguments regarding the Keating case are new, the case itself is not, and there is no apparent reason why the Tribe could not have advanced those arguments in its 1998 rehearing request. See Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991).

[19] Sierra Association for Environment v. FERC, 791 F.2d 1403 (9th Cir. 1986).

insofar as it raises issues concerning the 1987 water quality certification for the Cushman Project.

18. In any event, we have reviewed the Tribe's arguments and find that they do not provide any basis for us to require that Tacoma obtain a new water quality certification for the project. The Tribe argues that, under the Keating case,[20] the Commission "has jurisdiction to decide whether an applicant's water quality certification facially complies" with procedures required by Section 401(a)(1) of the CWA, and that, at a minimum, the "certification involves public notice."[21] The Tribe goes on to state: "Here, Ecology fully admitted that it did not issue public notice for the Cushman certification."[22] In reality, however, the facts are not clear. In response to a request from the Tribe, an Ecology official stated in a letter dated August 18, 1998: "In my review of Ecology's files, I was unable to find any documents demonstrating that a public notice or hearing were held regarding Items 1a, 1b and 1c [referencing Ecology's April 30, 1985 certification; the 1987 settlement agreement and hearings board's dismissal order of December 29, 1987; and Ecology's December 30, 1987 certification; respectively]." At the time that Ecology provided its 1998 letter, the events in question were more than ten years old. Lacking any information about Ecology's procedures for record retention and disposal, and in view of the amount of time that had passed, we do not consider it dispositive that Ecology was unable to locate any relevant records in its files. Regardless of whether Keating might give us any authority to decide this issue (which we doubt), we find that Ecology's 1998 letter is an inadequate basis upon which to invalidate the state's 1987 certification decision in this case.[23]

---

[20] 927 F.2d 616 at 623-24. As discussed in our September 24 order, the Keating case concerned a state's attempted revocation of water quality certification pursuant to Section 401(a)(3) of the CWA. The court held that the Commission has authority to consider whether the purported revocation meets the standards established in that Section (including whether the state's action is timely and in response to changed circumstances).

[21] Tribe's request for rehearing at 6.

[22] Id. (emphasis in original).

[23] Section 401(a) does not expressly require that states provide public notice of certification applications. Rather, it provides that states "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. §1341(a). Washington has had regulations in place establishing such procedures since the 1970s. See Washington Administrative Code, WAC 173-225-030 (Order DE 75-6, § 173-2225-030, filed Mar. 7, 1975; Order 73-29, §173-225-030, filed Nov. 15, 1973).

The Commission orders:

(A) The request for rehearing, filed by the Skokomish Indian Tribe on October 23, 2003, of that portion of our order of September 24, 2003, that denied its petition for a declaratory order concerning the Coastal Zone Management Act certification for the Cushman Project in this proceeding is denied.

(B) The request for rehearing, filed by the Skokomish Indian Tribe on October 23, 2003, of that portion of our order of September 24, 2003, that denied its petition for a declaratory order concerning the Clean Water Act certification for the Cushman Project in this proceeding is rejected.

(C) That portion of the petition for a declaratory order and motion for summary disposition, filed by the Skokomish Indian Tribe on April 25, 2003, in this proceeding, that concerns the Clean Water Act certification for the Cushman Project in this proceeding is rejected.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.